



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
LUKE H. BRITT**

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

March 23, 2014

Mr. Ryan P. Sink, Esq.
On behalf of Helen Warrix
255 North Alabama St., Second Floor
Indianapolis, IN 46204

Re: Formal Complaint 14-FC-29; Alleged Violation of the Access to Public Records Act by the City of Indianapolis

Dear Mr. Sink,

This advisory opinion is in response to your formal complaint alleging the City of Indianapolis ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* City Public Access Counselor Samantha DeWester, Esq., responded to your complaint which is attached for your reference. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on February 20, 2013.

BACKGROUND

Your complaint alleges the City of Indianapolis violated the Access to Public Records Act by denying producing records responsive to your request.

On October 31, 2013, you served upon the City a public records request seeking a number of documents relating to your client, Ms. Helen Warrix. Among the documentation requested, you sought the following:

all emails send and received from Scott Mason from April 1, 2013, until the present, wherein Helen Warrix's name is mentioned, in whole or in part, including pseudonyms.

The City provided a timely acknowledgement of your request on November 5, 2013 wherein the City advised you that a search was underway for documents responsive to your request. On December 10, 2013, the City provided you with partial satisfaction of your request. As to the email request listed above, the City stated your request was vague and not reasonably particular under Ind. Code § 5-14-3-3(a)(1).

You followed up on December 13, 2013 and renewed your request for the emails citing and including an Advisory Opinion from former Public Access Counselor, Joseph B. Hoage, in which he had opined a similar request was, in fact, reasonably particular.

The City was swayed by your argument and Counselor Hoage's Opinion and initiated a search on December 16, 2013. You did not hear from the City, so on February 5, 2014 you resubmitted the same request and imposed a deadline of February 17, 2014 for production, at which time you suggested civil litigation would be the next step in pursuing your search on behalf of your client. After the deadline had passed, you filed your complaint, received by this Office on February 20, 2014.

The City responded again arguing your request was not reasonably particular. It initiated a subsequent search, however, it was determined the City's email search capabilities were limited and therefore could not complete the search and produce any records. The City indicates a new system is being brought online which may yield results responsive to your request. It is unclear if this system is operational and if the search could be done post haste.

ANALYSIS

The public policy of the APRA states that "a (p) roviding person with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." See Ind. Code § 5-14-3-1. The City of Indianapolis is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the City's public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14- 3-3(a).

A request for records may be oral or written. See Ind. Code § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. See Ind. Code § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. See Ind. Code § 5-14-3-9(b). A response from the public agency could be an acknowledgement the request has been received and information regarding how or when the agency intends to comply.

Although you indicate on your formal complaint form the date of the denial to public access was February 18, 2014, you were effectively denied the records by the December 10, 2014 letter from the City stating the request was not reasonably particular. Although the City renewed the search based on your subsequent request, any potential violation occurred on December 10, 2013. Ind. Code § 5-14-5-7 states a formal complaint must be filed within 30 days of the alleged violation. I consider that timeframe to commence upon your receipt of the December 10, 2013 letter. Although a trier of fact may disagree with that conclusion if litigation is pursued, I opine this Advisory Opinion is for educational purposes only and not to be considered an exhaustion of administrative remedies for a cause of action under Ind. Code § 5-14-9-3.5.

As addressed *ad nauseum*, although not defined in the APRA, the Indiana Court of Appeals addressed the issue of reasonable particularity in the APRA in *Jent v. Fort Wayne Police Dept.*, 973 N.E.2d 30 (Ind. Ct. App. 2012), and again in *Anderson v. Huntington County Bd. of Com'rs.*, 983 N.E.2d 613 (Ind. Ct. App. 2013). The Court in *Jent* held that:

In response to a request under APRA, a public agency is required to search for, locate and retrieve records.

Whether a request identifies with reasonable particularity the record being requested turns, in part, on whether the person making the request provides the agency with information which enables the agency to search for, locate, and retrieve the records.

...a requested item has been designated with 'reasonable particularity' if the request enables the subpoenaed party to identify what is sought and enables the trial court to determine whether there has been sufficient compliance with the request.

The Court in *Jent* does not define "search, locate and retrieve". As a public agency seasoned in the business of responding to public records requests, it is not illogical to infer the City of Indianapolis is aware of the limitations of their email search system. The lack of ability to complete a search may be apparent on its face. If the City had received similar requests in the past and were unable to fulfill them, they would have the institutional knowledge to ascertain if the request is reasonably particular *to them*. Note that search capabilities are different in each agency depending on the capability of the storage medium; another consideration *Jent* presupposes.

Although *Jent* states an affirmative obligation to search, locate and retrieve, it is not always possible to satisfy the locating and retrieval requirements in situations where documents do not exist which are responsive to a request. Similarly, it may not be possible to satisfy the search requirement if the agency does not have the technological capability to perform a search based on the request.

I wholeheartedly agree with Counselor Hoage the most appropriate course of action is to seek further clarification from a requestor rather than flatly denying a request. I cannot say, however, a denial based on reasonable particularity is a violation of the APRA as he suggests. I do not think it is best practice to deny without extending the opportunity for clarification, therefore in that regard, the City has fallen short in their duty of providing transparency, but not its obligation under the law.

The City has taken a significant amount of time to respond to your resurrected request from its search initiation on December 16, 2013. The City contends its new software system now has the capability to respond to your request. It has now been nearly five months since your original request. It is my expectations the City produce the documents you seek in an expeditious manner.

CONCLUSION

For the foregoing reasons, the City of Indianapolis has not violated the Access to Public Records Act.

Regards,

A handwritten signature in black ink, appearing to be 'L. H. Britt', written in a cursive style.

Luke H. Britt
Public Access Counselor

Cc: Ms. Samantha DeWester, Esq.